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Supreme Court, U.S.
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No. 04-820

IN THE

Supreme Court of the United States

CLIFFORD ACREE, *et al.*,

Petitioners,

v.

REPUBLIC OF IRAQ, *et al.*

and

UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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I. The United States Mischaracterizes the Court of Appeals' Holding With Respect to the Availability of a Cause of Action Under Section 1605(a)(7) of the FSIA

The United States does not deny that the Iraqi defendants are liable to petitioners for the acts of torture committed against them "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Nor does the United States deny that Section 1606 of the Foreign Sovereign Immunities Act ("FSIA"), as interpreted by the Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), requires courts to apply state law rules of liability. Finally, the United States does not deny that the severe torture inflicted upon petitioners satisfies the elements of assault, battery, and intentional infliction of emotional distress. There is, in short, no dispute that the Iraqi defendants are liable to petitioners under the common law torts adjudicated by the district court.

Unable to disagree with petitioners on any material issue of liability, the United States tries to change the subject to an issue that the court of appeals did *not* address, namely, the question of *which* jurisdiction's law should apply in determining liability under Section 1605(a)(7). However, this was not the basis on which the court of appeals vacated the judgment. Rather, as the following passage indicates, the court of appeals perceived a distinction between what it viewed as the requirement of a "federal cause of action" under the FSIA and the question of what *substantive law* should apply to determine liability:

> [G]eneric common law cannot be the *source* of a federal cause of action. The shared common law of the states may afford useful guidance as to the rules of decision in a FSIA case where a cause of action arises from some specific and concrete source of law. *See Bettis*, 315 F.3d at 333 (assuming, *arguendo*, that plaintiffs stated a cause of action under the Flatow Amendment and then turning to generic common law to flesh out the controlling substantive law). But there is no support

> for the proposition that generic common law itself may furnish the cause of action.

Acree v. Republic of Iraq, 370 F.3d 41, 59 (D.C. Cir. 2004) (underscores added). Clearly, the court of appeals believes that plaintiffs under § 1605(a)(7) must first demonstrate the existence of a "federal cause of action" that is distinct from the "substantive law" (or "rules of decision") that a court would apply to determine liability.

Therein lies a core error of both *Acree* and *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), and the error that requires correction by the Court. Contrary to the suggestion by the United States that these decisions are consistent with the plain language of the FSIA and the Court's decision in *First Nat'l City Bank*, the D.C. Circuit has refused to recognize that Section 1606 of the FSIA already provides the "federal cause of action" that allows federal courts to adjudicate state law claims, including common law torts, against non-immune state sponsors of terror. By requiring plaintiffs to identify a "federal cause of action" *separate* from the state law bases of liability (*e.g.*, torts) that are cognizable under § 1606, the D.C. Circuit has departed from the plain meaning of the statement that foreign sovereigns "*shall be liable* in the same manner and to the same extent as a private individual under like circumstances," as well as the Court's decision in *First Nat'l City Bank*.[1] In addition, the D.C. Circuit has ignored the unmistakable intent of Congress that victims of terror would have the right to seek redress in federal courts. *See* Pet. at 16, n.3; *see also* Brief Amici Curiae of Washington Legal Foundation and 20 Members of Congress at 11-16.

The United States seeks to gloss over this profound misinterpretation of § 1605(a)(7) by implying that the court of

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1. Consider, in this regard, the fact that there is no "federal cause of action" for breach of contract, and yet it is beyond dispute that plaintiffs may bring state law breach of contract claims against non-immune foreign sovereigns under the waiver (§ 1605(a)(1)) or commercial activity (§ 1605(a)(2)) exceptions. There is no distinction between the assertion of state law breach of contract claims under these exceptions and the assertion of state law tort claims under § 1605(a)(7). In neither case is a distinct "federal cause of action" required.

appeals rested its decision on an *Erie*-type concern about *which* jurisdiction's laws should apply in determining substantive liability under § 1605(a)(7). *See* U.S. Br. at 19. This entirely misreads the basis for the court of appeals' decision. Courts in the D.C. Circuit have consistently applied general principles of tort law, such as those found in the *Restatement (Second) of Torts*, in determining liability under § 1605(a)(7). *See Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332-33 (D.C. Cir. 2003) (reviewing D.C. Circuit practice and observing that its courts have "looked to the common law of the states" in FSIA cases). The *Acree* court did not refer to or repudiate this long-established practice and, in fact, it favorably cited *Bettis* for the proposition that "generic common law" may provide the "controlling substantive law" – so long as the court's erroneous requirement of a distinct "federal cause of action" is met.[2] 370 F.3d at 59. Moreover, it would have been passing strange for the court of appeals to vacate the judgment on choice of law grounds, when there is no doubt that the Iraqi defendants would be liable to petitioners in tort under the laws of *every* U.S. state and the District of Columbia, as well as under the laws of any civilized nation whose laws a federal court might apply as the result of a conflicts of law analysis (including the laws of Iraq).[3]

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2. By trying to divert attention from the court of appeals' mistaken interpretation of § 1605(a)(7), the United States has merely highlighted the fact that the circuit courts of appeals are divided on the question of which *substantive* law should apply in FSIA cases – the law of the forum or general principles of common law. *See* Pet. at 15, n.2 (reviewing cases). *See also* 14A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3662, p. 231 (3d ed. 1998) ("there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern"). Petitioners encourage the Court to grant certiorari in order to resolve this issue as well as the distinct issue of whether a separate "cause of action" is required under the FSIA.

3. Indeed, the U.S. interpretation of *Acree* leads to the remarkable conclusion that the court of appeals *sua sponte* vacated a $959 million judgment on choice of law grounds even though Rule 8 of the F.R.C.P. does not require plaintiffs to plead state law, and even though "federal courts are required to take judicial notice of the laws of every state of the union." (Cont'd)

By interposing a non-existent requirement for a distinct "federal cause of action," there can be no doubt that the D.C. Circuit has interpreted § 1605(a)(7) to bar plaintiffs from doing exactly what the statute permits – asserting state law claims against state sponsors of terror. The United States does not seriously dispute the fact that the D.C. Circuit is effectively the mandatory venue for cases arising under § 1605(a)(7).[4] Thus, unless the Court corrects the court of appeals' error, the doors of justice will remain closed to U.S. citizens who are victims of terror.

II. The United States' Arguments With Respect to Other Causes of Action Are Mistaken

The D.C. Circuit's mistaken interpretation of the Flatow Amendment is important but ultimately irrelevant, as petitioners unmistakably have a cause of action under § 1605(a)(7) and § 1606 to assert state law claims against all Iraqi defendants. Nonetheless, the United States does not come to terms with the fact that the language and structure of the Flatow Amendment are identical to the Federal Tort Claims Act, which makes the United States liable for the actions of its officials and agents under ordinary principles of *respondeat superior*. Contrary to the United States' assertion that the court

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(Cont'd)

5 Wright & Miller, *Federal Practice and Procedure* § 1253, p. 498 (3d ed. 2004). If this had been the court of appeals' actual concern – and not its misguided belief that the FSIA requires a distinct "federal cause of action" – the correct response would have been to remand to the district court for further development of the controlling law.

4. In addition to the two cases cited by petitioners, the United States cites *one* other case arising under § 1605(a)(7) decided outside the D.C. Circuit, *Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003). This case resulted in a default judgment against the Afghan and Iraqi defendants, and venue was not contested even though it was almost certainly not proper. All of the approximately 45 other cases decided under § 1605(a)(7) have been heard in the D.C. Circuit. Moreover, it is irrelevant (U.S. Br. at 25-26) that *other* types of claims may be litigated against state sponsors of terror in other federal circuits; the issue here is whether the waiver of immunity for acts of torture and other violations of international law specified in § 1605(a)(7) is to have any effect in the D.C. Circuit, the venue that Congress has required for nearly all such claims.

of appeals "properly rejected" this argument, U.S. Br. at 22, the court of appeals did not address this issue *at all*. Moreover, the *amici curiae* brief of the Washington Legal Foundation and 20 Members of Congress (including Rep. Saxton, the original sponsor of the Flatow Amendment) demonstrates that the court of appeals' interpretation of the Flatow Amendment was in error.

Finally, with respect to the availability of a cause of action for violation of universally accepted international legal norms against torture, discussed by the Court last term in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), the United States contends that petitioners did not raise this argument below. This is incorrect. Petitioners specifically identified to the district court the possibility of a "cause of action for torture under customary international law," but noted that it was unnecessary for the court to develop this cause of action in light of the clear availability of other causes of action (*e.g.*, under § 1605(a)(7)). *See* Pet. App. G at 179a, n.17. Moreover, the Court issued its decision in *Sosa* after the court of appeals ruled in this case, precluding any argument concerning the implications of that decision. As for the United States' contention that the principles elaborated in *Sosa* are inapplicable in cases arising under § 1605(a)(7), this argument is fully disposed of in the *amici curiae* brief submitted by the Center for Justice & Accountability and 21 international law scholars at 14-15. Notably, the United States does not appear to dispute the existence of a universally recognized international legal norm against torture.

III. The United States' Jurisdictional Argument, Rejected by the Court of Appeals, Is Without Merit

The United States seeks to relitigate its argument, rejected by the court of appeals below, that the district court was without jurisdiction at the time it entered judgment in this case. The government's argument is that a single clause in a proviso to a supplemental appropriations bill had the effect of permanently and retroactively altering the jurisdiction of federal courts, even though nothing in the

bill or its legislative history makes any reference to federal court jurisdiction. This argument is without merit.

Section 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559 (2003) ("EWSAA"), authorized the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990." The Iraq Sanctions Act, Pub. L. No. 101-513, 104 Stat. 1979 (1990) ("ISA") had required the President to "fully enforce" against Iraq specified laws prohibiting economic assistance to terrorist states, including § 620A of the Foreign Assistance Act of 1961, as well as "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c), 104 Stat. 1979, 2051.

Section 620A of the Foreign Assistance Act, 22 U.S.C. § 2371 (2004) ("FAA"), referred to in the ISA, bars U.S. foreign assistance to countries that the Secretary of State has designated as "repeatedly provid[ing] support for acts of international terrorism." Section 620A also sets forth conditions under which the Secretary is authorized to rescind the designation of a country as a state sponsor of terrorism. To do so, the Secretary must certify that the foreign government "is not supporting acts of international terrorism" and that it "has provided assurances that it will not support acts of international terrorism in the future." 22 U.S.C. § 2371(c)(1).

Following the liberation of Baghdad on April 9, 2003, a critical problem facing the U.S. stabilization and reconstruction effort was that the ISA and other laws that prohibited assistance to Iraq would bar the transfer of funds and material to Iraq unless Iraq was decertified as a state sponsor of terror. There was, however, no Iraqi government in place to provide the representations required under § 620A of the FAA. Section 1503 of the EWSAA therefore authorized the President to suspend the ISA, subject to eight provisos. The second proviso stated that "the President may make inapplicable with respect to Iraq section 620A of the

Foreign Assistance Act of 1961 *or any other provision of law that applies to countries that have supported terrorism.*" 117 Stat. 579 (emphasis added).

The Government's contention that the clause italicized above was somehow intended to affect the jurisdiction of federal courts violates "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The purpose of § 1503 was to authorize the President to suspend the ISA, which, as described above, prohibited economic assistance to Iraq and called for enforcement of other laws that "impose sanctions" on state sponsors of terrorism. The second proviso, which necessarily relates to the enacting clause, *see United States v. Morrow*, 266 U.S. 531, 534 (1925), elaborates upon this authority by making clear that the President is authorized to suspend § 620A of the FAA, a law that likewise prohibits economic assistance to state sponsors of terrorism. As the court of appeals cataloged below, *all* of the laws encompassed by the ISA relate to prohibitions on economic assistance to, or trade with, countries that are state sponsors of terrorism, and *none* relate to the jurisdiction of federal courts. *Acree*, 370 F.3d at 53. In this context, and consistent with the overall purpose of the EWSAA, the reference in the second proviso to "any other provision of law that applies to countries that have supported terrorism" logically encompasses only those laws that impose obstacles to the provision of economic and material assistance to Iraq.

The scope of § 1503 is confirmed by its legislative history. The EWSAA originated as a request from the President for emergency supplemental appropriations to support military operations in Iraq. In his request, the President proposed a repeal of the ISA, subject to the proviso "that the President may make inapplicable with respect to Iraq section 620A of the [FAA] or other provision of law that applies to countries that have supported terrorism." H.R. Doc. No. 108-55, at 24 (2003). The request explained that this proviso would "authorize the President to make

inapplicable with respect to Iraq section 620A, section 620G, and section 307 of the Foreign Assistance Act."[5] *Id.* The President's request made no mention of the FSIA, federal jurisdiction, or of absolving Iraq of past liabilities.

The President's proposed language went through the House and Senate materially unchanged, and both the House and Senate reports explained that the provision would allow the President to suspend the ISA and other laws that imposed limitations on assistance to Iraq. *See Acree*, 370 F.3d at 55. The final conference report explained that § 1503 "would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act." H.R. Conf. Rep. No. 108-76, at 76 (2003). Neither the conference report nor any other part of the legislative history contains any reference to the FSIA, the jurisdiction of federal courts, or to the notion of absolving Iraq of liability for its torture of American POWs while designated as a state sponsor of terrorism.

The United States pegs much of its jurisdictional argument on the notion that Congress intended § 1503 to deal with "dramatically changed circumstances in Iraq." U.S. Br. at 4. What the United States fails to address, however, is the fact that Congress has already established a clear temporal rule concerning the immunity of former terrorist states. In this regard, § 1605(a)(7) provides that a foreign state is not immune for acts of torture, and federal courts continue to have jurisdiction, if the foreign state was designated as a state sponsor of terrorism *"at the time the act occurred."* 28 U.S.C. § 1605(a)(7). In adopting such clearly retroactive language, Congress could not have been more explicit that former terrorist states are not absolved of liability when their status later changes, even "dramatically."

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5. Section 620G of the FAA prohibits assistance to any country that supports a designated state sponsor of terrorism, *see* 22 U.S.C. § 2377; section 307 of the FAA prohibits U.S. multilateral assistance to designated countries, including Iraq, *see* 22 U.S.C. § 2227.

It is undisputed that Iraq was designated as a state sponsor of terrorism at the time it tortured the 17 American POWs who are the petitioners in this case. It is also undisputed that, on this basis, the district court properly exercised jurisdiction over petitioners' claims. *See* Pet. App. C at 137a. The Government's jurisdictional argument therefore depends on the proposition that § 1503 *sub silentio* repealed the temporal rule of immunity under § 1605(a)(7), at least as it relates to Iraq.

The Government's interpretation of § 1503 violates the rule of statutory construction that "'where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)). As the Court has explained,

> [A] subsequent statute in general terms . . . and not expressly contradicting the original act . . . shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

Id. (quoting T. Segwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). *See also Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 374 (1990); *Traynor v. Turnage*, 485 U.S. 535, 551 (1988). Even if one were to accept the hypothesis that § 1503 had any bearing upon § 1605(a)(7), it is entirely possible to interpret the two statutes in a way that gives effect to both. The authorization given to the President to "make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism" is naturally read as authorizing the President to treat Iraq as if it were no longer designated as a state sponsor of terror. This interpretation would be consistent with the purpose of removing obstacles to the reconstruction of Iraq and acknowledging the changed status of that country after the downfall of Saddam Hussein. Nonetheless, under the plain language of § 1605(a)(7), which § 1503 did not address, this would only have the effect of

restoring Iraq's immunity for acts committed *after* the Presidential determination. Nothing in the purported authorization to make the FSIA "inapplicable with respect to Iraq" compels the conclusion that Congress intended to upset the temporal principle clearly established by § 1605(a)(7), *i.e.*, that immunity and jurisdiction are based on the foreign sovereign's status at the time the act occurred.[6]

The United States has nothing to say about this fundamental flaw in its jurisdictional argument, even though both opinions of the court of appeals discussed the temporal rule of § 1605(a)(7) at length. The specificity of § 1605(a)(7) with regard to when immunity attaches could not be more evident. Congress foresaw that a terrorist state might later be decertified as a state sponsor of terror, but it unmistakably provided that the foreign state would not thereby gain immunity for acts that it committed when it was so designated. It defies belief that Congress had a "clear intention" to overturn this carefully articulated principle through a proviso in a supplemental appropriations bill that does not even make reference to the FSIA, let alone to the temporal rule of § 1605(a)(7).[7]

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6. In his concurrence below, Judge Roberts hypothesized that Congress *might* have intended to set aside the clear temporal principle of § 1605(a)(7) as it applied to Iraq, but agreed that this "view of Congress's purpose" in enacting § 1503 was "necessarily speculative." *Acree*, 370 F.3d at 63. If it requires speculation to interpret a statute so as to repeal the "more particular or positive provisions" of a previously enacted statute, such an interpretation necessarily fails the clear intent requirement articulated in *Radzanower* and other cases.

7. For the same reason, the claim that the President's interpretation of § 1503 is entitled to "deference" is misplaced. U.S. Br. at 12. Congress did not even remotely authorize the President to absolve Iraq of its past liabilities or alter the temporal rule of § 1605(a)(7), and thus the President's actions in the exercise of foreign affairs are not entitled to the presumption of validity discussed in *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981). In fact, it was not until *after* Congress enacted the EWSAA that the President first took the position that § 1503 encompassed the FSIA, and then only in his report to Congress – not in the actual Presidential Determination published in the Federal Register. *See* Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003). The President's claim that § 1503 encompasses the FSIA has every appearance of being a post hoc invention specifically conceived to defeat the judgment in this case.

Respectfully submitted,

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